

1 THE HONORABLE RICHARD A. JONES  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 DIGITAL MENTOR, INC., a Delaware  
11 corporation,

12 Plaintiff,

13 v.

14 OVIVO USA, LLC, a Delaware corporation;  
15 OVIVO US HOLDING INC., a Delaware  
16 corporation; VALERE MORISSETTE, an  
individual; and DOES 1 to 20,

17 Defendants.

Case No. 2:17-CV-01935-RAJ

18 **OVIVO USA'S ANSWER AND  
19 AFFIRMATIVE DEFENSES TO  
FIRST AMENDED  
COMPLAINT FOR  
INJUNCTIVE RELIEF AND  
DAMAGES**

20 **DEMAND FOR JURY TRIAL**

21 Defendant Ovivo USA, LLC, ("Ovivo USA") by and through its attorneys of record  
22 hereby submits this Answer and Affirmative Defenses to Plaintiff Digital Mentor, Inc.'s  
23 ("DMI") First Amended Complaint ("FAC") (Dkt. #76).

24 **PRELIMINARY STATEMENT**

25 In its December 21, 2018 Order, the Court granted Ovivo US Holding Inc.'s and Valere  
26 Morissette's respective Motions to Dismiss DMI's FAC. As such, Ovivo US Holding Inc. and  
Valere Morissette are no longer defendants in this matter, are not subject to the Court's  
jurisdiction, and are not required to respond to DMI's FAC. Any allegations from DMI  
referring to Ovivo US Holding Inc. or Valere Morissette as defendants will be understood to

be referring to the entity or person as a third party to this action. Further, none of the responses herein should be interpreted or understood to be admissions, denials or other statements made by either Ovivo US Holding Inc. or Valere Morissette.

Similarly, in the December 21, 2018 Order, Ovivo USA, LLC's ("Ovivo USA") Motion to Dismiss Digital's First Amended Complaint was granted in-part such that only Count III, IV, VI, VIII and IX remain in the case. Ovivo USA will not be responding to any allegations contained in Counts that were dismissed by the Court in its December 21, 2018 Order. Similarly, Ovivo USA will not be responding on behalf of any prior defendant, such as Ovivo US Holding Inc. or Valere Morissette, that was dismissed from the case by the Court's December 21, 2018 Order. Any responses contained herein are solely those of Ovivo USA based upon the current knowledge and information in the possession, custody and control of Ovivo USA.

## ANSWER

Defendant Ovivo USA answers Plaintiff DMI's FAC as set forth below.

## PARTIES

1. Defendant Ovivo USA LLC (“Ovivo”) admits that Digital is a Delaware corporation having a place of business at 865 Tahoe Blvd, Suite 214, Incline Village, Nevada and is registered to do business in the State of Washington. Ovivo USA does not have sufficient information to admit or deny the remaining allegations set forth in this Paragraph and, therefore, denies same.

2 Ovivo USA denies that it provides equipment for water and wastewater treatment facilities around the world. Admitted as to the other allegations.

### 3. Admitted.

#### 4. Admitted.

5. To the extent the allegations of this Paragraph purport to state a legal conclusion, no response thereto is required. To the extent a response is deemed to be required, Ovivo USA does not have sufficient information to admit or deny the allegations set forth in this Paragraph, and, therefore, denies same.

## 6. Denied.

7. Denied.

8. Denied.

9. To the extent the allegations of this Paragraph purport to state a legal conclusion, no response thereto is required. To the extent a response is deemed to be required, Ovivo USA denies the allegations of this Paragraph.

10. To the extent the allegations of this Paragraph purport to state a legal conclusion, no response thereto is required. To the extent a response is deemed to be required, Qvivo USA denies the allegations of this Paragraph.

## JURISDICTION AND VENUE

11. Ovivo USA admits that the Court has subject matter jurisdiction in this case. Ovivo USA denies any and all remaining allegations in the paragraph.

12. Ovivo USA admits that it is registered to do and has done business in the state of Washington. Ovivo USA admits that Valere Morissette is an officer of Ovivo USA. Ovivo USA admits that the Court has personal jurisdiction over it for this matter and that it is not

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challenging venue before the Court at this time. Ovivo USA denies any and all other allegations of the paragraph.

13. To the extent the allegations of this Paragraph purport to state a legal conclusion, no response thereto is required. To the extent a response is deemed to be required, Ovivo USA denies the allegations of this Paragraph.

## **ALLEGATIONS COMMON TO ALL CAUSES**

## A. The Water Treatment Industry Before Digital Mentor®

14. Denied.

15. Ovivo USA does not have sufficient information to admit or deny the allegations set forth in this Paragraph and, therefore, denies same.

## B. The Development of Digital Mentor®

16. Ovivo USA does not have sufficient information to admit or deny the allegations set forth in this Paragraph and, therefore, denies same.

17. Ovivo USA does not have sufficient information to admit or deny the allegations set forth in this Paragraph and, therefore, denies same.

18. Ovivo USA does not have sufficient information to admit or deny the allegations set forth in this Paragraph and, therefore, denies same.

19. Ovivo USA does not have sufficient information to admit or deny the allegations set forth in this Paragraph and, therefore, denies same.

20. Ovivo USA admits that water and wastewater facilities are often owned by municipalities or corporations, that the facilities sometimes contain large pieces of equipment,

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1 and that the water treated in such facilities may be used by the public. Ovivo USA denies any  
2 and all other allegations in the paragraph.

3 21. Ovivo USA does not have sufficient information to admit or deny the  
4 allegations set forth in this Paragraph and, therefore, denies same.

5 22. Ovivo USA does not have sufficient information to admit or deny the remaining  
6 allegations set forth in this Paragraph and, therefore, denies same.

7 23. Ovivo USA does not have sufficient information to admit or deny the remaining  
8 allegations set forth in this Paragraph and, therefore, denies same.

9 24. Ovivo USA does not have sufficient information to admit or deny the remaining  
10 allegations set forth in this Paragraph and, therefore, denies same.

11 25. Ovivo USA does not have sufficient information to admit or deny the remaining  
12 allegations set forth in this Paragraph and, therefore, denies same.

13 26. Ovivo USA does not have sufficient information to admit or deny the remaining  
14 allegations set forth in this Paragraph and, therefore, denies same.

15 27. Ovivo USA does not have sufficient information to admit or deny the remaining  
16 allegations set forth in this Paragraph and, therefore, denies same.

17 28. Denied.

18 **C. Digital Mentor®, the Final Product**

19 29. Denied.

20 30. Denied.

21 31. Denied.

22 32. Denied.

1 33. Denied.

2 **D. The Relationship Between Digital and Ovivo USA**

3 34. Denied.

4 35. Ovivo USA admits that Mr. Wenger and Ms. Hueman met with representatives  
5 of Ovivo USA in March 2014 in Austin, Texas and that at least Dennis Livingston, Jim  
6 Porteous and Elena Bailey participated in that meeting. Ovivo USA denies any and all other  
7 allegations in the paragraph.

8 36. Ovivo USA admits that Mr. Wenger and Ms. Hueman had an iPad with them  
9 at the meeting with representatives of Ovivo USA in March 2014 in Austin, Texas. Ovivo  
10 USA denies any and all other allegations in the paragraph.

11 37. Ovivo USA admits that Mr. Wenger and Ms. Hueman had an iPad with them  
12 at the meeting with representatives of Ovivo USA in March 2014 in Austin, Texas and that the  
13 iPad was not maintained at Ovivo USA. Ovivo USA further admits that there were other  
14 discussions with DMI after March 2014 concerning the Digital Mentor product. Ovivo USA  
15 denies any and all other allegations in the paragraph.

16 38. Ovivo USA admits that a copy of a document entitled “DIGITAL MENTOR,  
17 INC. NON-DISCLOSURE AGREEMENT” is attached as Exhibit A to the FAC and that its  
18 effective date is recited as November 1, 2014. Ovivo USA denies any and all other allegations  
19 in the paragraph.

20 39. Ovivo USA admits that it issued Purchase Order DAW0008517 dated  
21 December 12, 2014 to Telegraph Engineering LLC. Ovivo USA denies any and all other  
22 allegations in the paragraph.

1       40.     Ovivo USA admits it held its 10th Annual MBR Operator's Workshop in  
2 Austin, Texas on May 14 and 15, 2015. Ovivo USA further admits that the Workshop was  
3 open to and attended by MBR operators using both Ovivo USA MBR and different MBR  
4 technology. Ovivo USA further admits that DMI was involved in at least one presentation  
5 during the Workshop. Ovivo USA denies any and all other allegations in the paragraph.  
6

7       41.     Denied.

8       42.     Ovivo USA admits that it requested DMI to use Ovivo USA's intellectual  
9 property such as copyrighted materials, and its DigitalOPS mark and other branding, including  
10 fonts and icons, in association with product DMI provided to Ovivo USA's customers. Ovivo  
11 USA denies any and all other allegations in the paragraph.

12       43.     Denied.

13       44.     Denied.

14       45.     Ovivo USA admits that the Digital Mentor product has been provided for use  
15 with Ovivo USA customers in nine states and four foreign countries. Ovivo USA denies any  
16 and all other allegations in the paragraph.

17       46.     Denied.

18       47.     Denied.

19

20       **E. Ovivo USA's Theft of Digital's Intellectual Property and Interference with**  
21       **Digital's Business Relationships**

22       48.     Ovivo USA admits that it requested DMI to use Ovivo USA's intellectual  
23 property such as copyrighted materials, and its DigitalOPS mark and other branding, including  
24 fonts and icons, in association with product DMI provided to Ovivo USA's customers. Ovivo  
25 USA denies any and all other allegations in the paragraph.  
26

1 49. Denied.

2 50. Denied.

3 51. Denied.

4 52. Denied.

5 53. Denied.

6 54. Ovivo USA admits that there was a meeting between it and DMI where David  
7 Williams demonstrated Ovivo USA's WaterExpert software product. Ovivo USA denies any  
8 and all other remaining allegations of this paragraph.

9 55. Denied.

10 56. Denied.

11 57. Denied.

12 58. Denied.

13 59. Ovivo USA admits that Mr. Porteous passed away in March 2017. Ovivo USA  
14 denies any and all other remaining allegations of this paragraph.

15 60. Denied.

16 61. Denied.

17 62. Denied.

18 63. Denied.

19 64. Denied.

20 65. Denied.

21 66. Denied.

22 25 //

1       67.     Ovivo USA admits that it attended the WEFTEC conference in Chicago  
2 around September 30 to October 4, 2017 as an exhibitor and that its WaterExpert product  
3 was available for demonstration. Ovivo USA denies Denied as to any and all other  
4 remaining allegations of this paragraph.  
5

6       68.     Denied.  
7

8       69.     Denied.  
9

10      70.     Denied.  
11

12      71.     Ovivo USA admits that it continues to use and distribute its WaterExpert  
13 product. Ovivo USA denies any and all other allegations in this paragraph.  
14

15      72.     Denied.  
16

17      73.     Denied.  
18

19      74.     Denied.  
20

21      75.     Denied.  
22

## **FIRST CAUSE OF ACTION**

### **Violation of the Federal Defend Trade Secrets Act (18 U.S.C. § 1836, et seq.) (as to All Defendants)**

19      76.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
20 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
21 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
22

23      77.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
24 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
25 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
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1       78.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
2 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
3 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
4

5       79.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
6 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
7 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
8

9       80.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
10 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
11 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
12

13       81.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
14 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
15 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
16

17       82.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
18 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
19 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
20

21       83.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
22 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
23 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
24

25       84.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
26 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
27 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
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85. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

86. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

87. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

88. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

89. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

## **SECOND CAUSE OF ACTION**

**Violation of the Federal Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961, et seq.)  
(as to All Defendants)**

90. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

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1       91.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
2 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
3 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
4

5       92.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
6 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
7 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
8

9       93.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
10 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
11 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
12

13       94.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
14 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
15 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
16

17       95.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
18 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
19 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
20

21       96.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
22 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
23 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
24

25       97.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
26 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
27 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
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29       //////  
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1       98.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
2 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
3 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
4

5       99.     In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
6 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
7 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
8

### **THIRD CAUSE OF ACTION**

#### **Trademark Infringement (15 U.S.C. § 1114)** *(as to All Defendants)*

100.    Ovivo USA incorporates by reference its answers to the preceding paragraphs,  
*supra*, as if set forth in full herein.

101.    Denied.

102.    Denied.

103.    Denied.

104.    Denied.

105.    Denied.

### **FOURTH CAUSE OF ACTION**

#### **Copyright Infringement** *(as to All Defendants)*

106.    Ovivo USA incorporates by reference its answers to the preceding paragraphs,  
*supra*, as if set forth in full herein.

107.    Denied.

108.    Denied.

1       109. Ovivo USA admits that DMI filed at least some applications for registration of  
2 copyright with the U.S. Copyright Office between the October 23, 2017 and November 13,  
3 2017. As DMI has refused to produce any applications, let alone provide an identification of  
4 those applications being asserted in this cause of action, Ovivo USA does not have sufficient  
5 information to admit or deny any and all other allegations set forth in this Paragraph and,  
6 therefore, denies same.  
7

8       110. To the extent the allegations of this Paragraph purport to state a legal  
9 conclusion, no response thereto is required. To the extent a response is deemed to be required,  
10 Ovivo USA denies the allegations of this Paragraph.

11       111. Denied.  
12

13       112. Denied.  
14

15       113. Denied.  
16

17       114. Denied.  
18

19       115. To the extent the allegations of this Paragraph purport to state a legal  
20 conclusion, no response thereto is required. To the extent a response is deemed to be required,  
21 Ovivo USA denies the allegations of this Paragraph.  
22

## **FIFTH CAUSE OF ACTION**

### **Violation of the Washington Uniform Trade Secrets Act (RCW 19.108.010, et seq.)** *(as to All Defendants)*

23       116. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
24 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
25 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
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1       117. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
2 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
3 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
4

5       118. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
6 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
7 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
8

9       119. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
10 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
11 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
12

13       120. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
14 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
15 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
16

17       121. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
18 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
19 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
20

21       122. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
22 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
23 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
24

25       123. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
26 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
27 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
28

29       /////  
30

1       124. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
2 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
3 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
4

5       125. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
6 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
7 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
8

## **SIXTH CAUSE OF ACTION**

### **Violation of the Washington Consumer Protection Act (RCW 19.86.010, et seq.)** *(as to All Defendants)*

11       126. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
12 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
13 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
14

15       127. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
16 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
17 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
18

19       128. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
20 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
21 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
22

23       129. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
24 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
25 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.  
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130. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

131. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

132 In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

133. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

## **SEVENTH CAUSE OF ACTION**

## **Breach of Contract (Non-Disclosure Agreement) (as to All Defendants)**

134. Ovivo USA incorporates by reference its answers to the preceding paragraphs, *supra*, as if set forth in full herein.

135. Denied.

136. Denied.

137. Denied.

138. Denied.

139 Denied

140 Denied

## **EIGHTH CAUSE OF ACTION**

## **Tortious Interference with Business Expectancy (as to All Defendants)**

141. Ovivo USA incorporates by reference its answers to the preceding paragraphs, *supra*, as if set forth in full herein.

142 Denied.

143. Denied.

144. Denied.

145. Denied.

146. Denied.

147. Denied.

148. Denied.

149. Denied.

## **NINTH CAUSE OF ACTION**

## **Fraud** *(as to All Defendants)*

150. Ovivo incorporates by reference its answers to the preceding paragraphs, *supra*, as if set forth in full herein.

151. Denied.

152 Denied.

153. Denied.

154. Denied.

155. Denied.

1 156. Denied.

2 157. Denied.

3 158. Denied.

4 159. Denied.

5 **TENTH CAUSE OF ACTION**

6 **Breach of a Fiduciary Duty**  
*(as to All Defendants)*

7 160. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
8 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
9 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

10 161. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
11 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
12 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

13 162. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
14 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
15 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

16 163. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
17 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
18 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

19 164. In its December 21, 2018 Order, the Court dismissed this Cause of Action and  
20 all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations  
21 contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

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## **ELEVENTH CAUSE OF ACTION**

## **Unjust Enrichment (as to All Defendants)**

165. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

166. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

167. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

168. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

169. In its December 21, 2018 Order, the Court dismissed this Cause of Action and all attendant allegations. Accordingly, Ovivo USA will not be responding to any allegations contained in this Cause of Action as being dismissed by the December 21, 2018 Order.

## **RESPONSE TO PRAYER FOR RELIEF**

Ovivo USA denies that DMI is entitled to any relief whatsoever, much less the relief sought in paragraphs 1-13 of DMI's Prayer for Relief.

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## AFFIRMATIVE DEFENSES

Ovivo USA alleges and asserts the following defenses in response to the allegations, undertaking the burden of proof only as to those defenses deemed affirmative defenses by law, regardless of how such defenses are denominated herein. In addition to the affirmative defenses described below, Ovivo USA specifically reserves all rights to allege additional affirmative defenses that become known through the course of discovery.

## First Affirmative Defense

*(Failure to State a Claim)*

DMI fails to state a claim upon which relief may be granted.

## Second Affirmative Defense

### *(Non-infringement)*

Ovivo USA does not infringe, has not infringed and is not liable for infringement of any copyrights or trademarks owned by DMI.

### **Third Affirmative Defense**

### *(Ownership)*

Ovivo USA is at least a partial owner of the alleged Knowledge Never Lost mark and the associated goodwill attributed to such mark.

#### **Fourth Affirmative Defense**

*(Invalidity/Unenforceability as to Trademark Rights)*

DMI's asserted trademark is invalid and/or unenforceable.

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## **Fifth Affirmative Defense**

### *(Descriptive Mark Lacks Secondary Meaning)*

DMI's alleged Knowledge Never Lost mark is descriptive of DMI's products used and/or services rendered such that the mark has not acquired any secondary meaning attributable to DMI.

## Sixth Affirmative Defense

(*Standing*)

DMI has failed to satisfy all conditions precedent to asserting a claim for copyright infringement of U.S.-based copyrights where its applications have neither registered nor been rejected by the U.S. Copyright Office.

## Seventh Affirmative Defense

### *(Lack of Ownership of Copyrights)*

DMI is not the owner of the copyrights sought to be enforced.

## **Eighth Affirmative Defense**

### *(Copyright Misuse)*

The doctrine of copyright misuse bars DMI from recovering on its copyright and state law claims as it is using such claims in an attempt to obtain property protection the copyright law clearly does not confer.

## **Ninth Affirmative Defense**

*(Copyrights are Invalid/Unenforceable)*

DMI's asserted copyrights are invalid and/or unenforceable.

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## **Tenth Affirmative Defense**

### *(Fair Use)*

Ovivo USA's use, if any, of DMI's alleged copyrights and Knowledge Never Lost mark constitutes permitted fair use.

## **Eleventh Affirmative Defense**

### *(Limitation on Copyright Damages)*

DMI is not entitled to recover statutory damages or attorneys' fees for any article on sale more than three months before DMI filed an application for copyright registration on the article accused to infringe said copyright.

## **Twelfth Affirmative Defense**

### **(Laches/Estoppel/Acquiescence/Waiver)**

DMI's claims are barred, in whole or in part, by the doctrine of laches, estoppel, acquiescence and/or waiver.

## **Thirteenth Affirmative Defense**

### *(Lack of Willfulness)*

DMI is not entitled to attorneys' fees or exemplary damages for copyright infringement or trademark infringement due to a lack of willfulness and/or DMI's failure to satisfy statutory requirements for the same.

## **Fourteenth Affirmative Defense**

### *(Unclean Hands)*

DMI's claims against Ovivo USA are barred under the doctrine of unclean hands.

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## Additional Defenses

Ovivo USA reserves the right to assert additional defenses based on information learned or obtained during discovery.

Dated this 18<sup>th</sup> day of January, 2019.

# SCHWABE, WILLIAMSON & WYATT, P.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of January, 2019, I caused to be served the foregoing OVIVO USA'S ANSWER AND AFFIRMATIVE DEFENSES TO FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES on the following parties at the following addresses:

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by:

- U.S. Postal Service, ordinary first class mail
- U.S. Postal Service, certified or registered mail,  
return receipt requested
- hand delivery
- facsimile
- electronic service – via United States District Court – Western District of Washington’s Electronic Case Filing System (“ECF”)
- other (specify)

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